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No. 94-225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WVCH, COMMUNICATIONS, INC.; THOMAS H. MOFFIT and ALICE E. MOFFIT,

Petitioners,

vs.

UPPER PROVIDENCE TOWNSHIP, UPPER PROVIDENCE TOWNSHIP ZONING HEARING BOARD, RHONE-POULENC RORER PHARMACEUTICAL, INC.; STERLING RESEARCH GROUP; SUE TIEFENTHALER, WALTER KALIL, CLAY HESS, Individually; KALIL PRINTING, INC. and THE SCHOOL BOARD OF THE SPRING FORD SCHOOL DISTRICT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS UPPER PROVIDENCE TOWNSHIP, UPPER PROVIDENCE ZONING HEARING BOARD, WALTER KALIL, CLAY HESS AND KALIL PRINTING, INC.

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS UPPER PROVIDENCE TOWNSHIP, UPPER PROVIDENCE ZONING HEARING BOARD, WALTER KALIL, CLAY HESS AND KALIL PRINTING, INC.

ISSUE FOR REVIEW

Whether the court of appeals properly affirmed the dismissal of these consolidated cases by the district court for failure of petitioners to claim or prove the existence of a protected property interest upon which to base their substantive due process claim?

RELATED PROCEEDING

Petitioners' appeal from the determination of the Zoning Hearing Board, whose manner of conducting the hearings they allege as a basis for the actions here appealed, is currently pending before the Court of Common Pleas of Montgomery County, Pennsylvania, sub nom Appeal of Thomas H. Moffit and Alice C. Moffit from the decision of the Upper Providence Township Zoning Hearing Board, No. 92-21993.

STATEMENT OF JURISDICTION

This Honorable Supreme Court has jurisdiction of the instant petition and brief in opposition thereto pursuant to 28 U.S.C. Section 1256.

IMPROPER INCLUSION OF CONSTITUTIONAL PROVISION

Petitioners have incorrectly included the First Amendment in their citation of constitutional provisions involved here. While their complaints included causes of action based on the First Amendment, the district court dismissed these causes of action, which were never appealed.

COUNTERSTATEMENT OF THE CASE

The instant petition has been made by plaintiffs below who seek to appeal the affirmance of the Third Circuit Court of Appeals of the dismissal of two consolidated cases brought pursuant to 42 U.S.C. §1983. The cases grew out of the

petitioners' dissatisfaction with zoning hearing board proceedings, the resulting decision of which is currently on appeal to the Court of Common Pleas of Montgomery County, Pennsylvania. The lower court granted defendants' motion to dismiss for failure of plaintiffs to state any viable causes of action. Plaintiffs appeal the dismissal of their claims for violation of their substantive due process rights and for injunctive and declaratory relief. They have not at any time in these actions challenged the ruling of defendant Zoning Hearing Board.

Procedure.

On October 5, 1992, petitioners filed the first of these two actions, No. 92-cv-5755, in the U.S. District Court for the Eastern District of Pennsylvania, purporting to state claims against the answering respondents Zoning Hearing

Board of Lower Providence Township and the Township, Rhone-Poulenc Rorer Pharmaceutical, Inc., the Sterling Research Group and Sue Tiefenthaler for alleged deprivation of petitioners' First, Fifth and Fourteenth Amendment rights and for civil conspiracy by the defendants to accomplish this deprivation. Petitioners sought injunctive and declaratory relief, compensatory and punitive damages and attorneys fees and costs.

Petitioners directed their allegations chiefly at the manner in which proceedings on their application to challenge the local zoning ordinance were conducted by the defendant Zoning Hearing Board, which denied their application on October 2, 1992 after a lengthy series of hearings. In connection with their request for equitable relief, petitioners

alleged that federal law preempted "RFI" (Radio Frequency Interference) considerations by the Board, which had not based its decision on them.

Defendant/respondents in the first case filed a motion to dismiss the complaint and opposed petitioners' request for declaratory and injunctive relief. The trial court, by orders dated December 23, 1992 and February 12, 1993, dismissed all of petitioners' claims except for violation of their substantive due process rights. The court noted that petitioners failed to state any valid basis for equitable relief.

The court also noted that petitioners were not asking it to review the decision of the Zoning Hearing Board. Nonetheless, it allowed petitioners to maintain their substantive due process

claim for respondents' alleged "unreasonably delaying a decision."

On April 27, 1993, petitioners instituted the second of these cases, No. 93-cv-2225, against answering respondents Walter Kalil and Clay Hess, members of the Zoning Hearing Board, in their personal capacities, as well as Mr. Kalil's business and the local school district. The complaint purported to state the same claims as in the first action, except the equitable claims, and added a pendent claim for violation of state constitutional rights. As before, petitioners' allegations focused solely upon the conduct of the Board's hearings. Id.

Respondents in the second case subsequently sought the dismissal of the complaint or, alternatively, that the trial court abstain.

By order dated July 18, 1993, the district court dismissed the complaints in both cases. Key to the court's decision was its ruling that, in accordance with the precedents of this Honorable Supreme Court and the Third Circuit, no claim for deprivation of substantive due process rights can lie unless a plaintiff demonstrates that it has been deprived of a protected property interest, which petitioners have not done. The district court did not reach the issue of judicial immunity as to defendants Kalil and Hess.

The Third Circuit Court of Appeals affirmed the dismissal order of the district court by judgment order dated July 16, 1993 and denied petitioners' petition for rehearing by order dated June 1, 1994.

Facts.

Petitioners, seeking to relocate and expand their radio station, purchased property in respondent Township knowing that it was not properly zoned for this purpose. In an attempt to alter the ordinance to suit their ends, petitioners challenged its constitutionality, maintaining that it excludes radio stations from the Township. Petitioners' challenge to the ordinance generated opposition by the Township and a wide variety of its citizens, including defendant corporations Rhone-Poulenc Rorer Pharmaceutical, Inc. and Sterling Research Group, who opposed the proposed location of petitioners' radio tower on extensive legal and scientific grounds. Petitioners and their supporters contested these grounds. The resultant series of hearings, allowing for the

presentation of inter alia extensive expert evidence and rebuttal, lasted from September 21, 1989 to August 20, 1992. Although petitioners resorted to the Pennsylvania trial court to resolve a discovery dispute related to the hearings, they never sought an injunction to curtail the proceedings they now portray as unduly extended.

The proceedings culminated in the October 2, 1992 opinion of the Zoning Hearing Board, in which the Board determined that the zoning ordinance was constitutionally valid and denied petitioners' application for relief from it. Because of its analysis of the constitutionality of the zoning ordinance, the Board did not reach issues such as "RFI" (Radio Frequency Interference), upon which petitioners base their claim for declaratory relief.

Plaintiffs' appeal from the determination of the Zoning Hearing Board is currently pending before the Court of Common Pleas of Montgomery County, at No. 92-21993. The appeal sets forth as a basis for reversal of the Board's order the same wrongdoing -- intentional delay of proceedings and bias -- that plaintiffs allege in the actions that are the subject of the instant petition.

ARGUMENT

1. **The Lower Courts Correctly Determined That Plaintiffs Had Failed To State A Claim For Violation Of Their Substantive Due Process Rights.**

Plaintiffs, unable to demonstrate that they have been deprived of a property interest by defendants, nonetheless argue that their substantive due process protection against such a deprivation has been violated. This

position is illogical, contrary to law and devoid of merit.

Furthermore, petitioners abandoned their procedural due process claims below, despite the fact that their claims are quite plainly based upon objections to procedural rulings by the Upper Providence Zoning Hearing Board.

The principle that due process concerns arise only in relation to the deprivation of protected rights is rooted in the language of the Constitution. The Fourteenth Amendment provides pertinently that no state shall "deprive any person of life, liberty or property, without due process of law..." This language echoes the Fifth Amendment guarantee against such deprivations by the federal government. Nowhere does the Constitution establish due process protections as independent rights

available to enforce general notions of fairness. Rather, they are derivative and come into play solely when an individual's right to his or her life, liberty or property is at stake.

In accordance with this principle, this Honorable Supreme Court has repeatedly stated that one of the requirements of a valid due process claim is that the plaintiff must have suffered a deprivation of a protected right. Parratt vs. Taylor, 451 U.S. 527, 536-37, 101 Supreme Court 1908, 1912, 68 L.Ed.2d 420 (1981); Board of Regents of State College vs. Roth, 408 U.S. 564, 571, 92 Supreme Court 2701, 2705, 33 L.Ed.2d 548 (1972).

The Third Circuit has also repeatedly articulated this precondition for a due process claim. Taylor Investments, Ltd. vs. Upper Darby

Township, 983 F.2d 1285, 1292 (1993) (plaintiff must demonstrate deprivation of a protected property interest to prevail on substantive due process claim); Unger vs. National Residents Matching Program, 928 F.2d 1392, 1395 (1991) (first inquiry as to alleged Fourteenth Amendment violation is if protected interest in life, liberty or property is implicated), citing Robb vs. City of Philadelphia, 733 F.2d 286, 292 (1984); Winsett vs. McGinnes, 617 F.2d 996, 1004 (1980) (protectable liberty or property interest necessary for substantive and/or procedural due process claims).

The Third Circuit case most relied on by petitioners provides no exception to this rule. In Bello vs. Walker, 840 F.2d 1124 (3rd Cir. 1988) cert. denied, 109 Supreme Court 134, plaintiff

developer stated, inter alia, due process claims based upon the denial of building permits by defendant township; plaintiff's right to said permits had previously been established in the state courts. Id., at 1126.

Instantly, petitioners do not claim they had a protected property interest in the outcome of the Zoning Hearing Board, much less that they were deprived of such an interest. The district court noted that petitioners did not ask it to review the Board's decision, and petitioners' allegations in both complaints address -- and claim damages for -- only delay and bias by the defendants without regard to the result of the hearings. Petitioners thus invoke constitutional protection without establishing any constitutional basis for that protection in the form of deprivation of a property right. Alleged

Alleged unfairness does not suffice to state a constitutional tort.

The deficiency in petitioners' complaints is underlined by their contention that the trial court erred in dismissing their substantive due process cause of action. The thrust of the one substantive due process claim they articulate -- bias on the part of the Zoning Hearing Board -- inevitably rests on proof that the Board erred in its determination. Substantive due process claims go to the fairness of deliberate decisions of government officials. Bello vs. Walker, 840 F.2d 1124, 1128 (3rd Cir. 1988). Petitioners' failure to allege a right in a different outcome and thus obtain a constitutional review of the action of the Zoning Hearing Board is fatal to their claim because it is tantamount to asserting that they need

not be deprived of a protected property interest in order to state a due process claim, in contradiction to Parrat and Taylor, supra.

The remainder of petitioner's due process claims go to the manner in which the hearings were conducted and thus are procedural due process claims. Petitioners have not appealed from the lower court's dismissal of them. No cause of action exists for a substantive due process violation of procedural due process rights. This "piggybacking" of due process rights would in any case fail for lack of a basis in deprivation of life, liberty or property. Furthermore, pre- and post- deprivation considerations have no place in these cases, since petitioners have not established any deprivation of a protected right at all.

It should be noted also that petitioners were not without recourse regarding the alleged improprieties of the defendants. At all times during the course of the hearings, petitioners could have sought injunctive or other equitable relief from the Court of Common Pleas of Montgomery County. Indeed, on at least one occasion, petitioners sought and obtained relief from that court in the form of resolution of a discovery dispute in connection with the hearings before the Zoning Hearing Board. Petitioners were not helpless under state law, as they suggest.

Finally, petitioners purport to make arguments based upon a deprivation of their liberty interest. Not only are such arguments totally unsupported by authority, but they were not made before the circuit court.

Accordingly, answering respondents Kalil, Hess and Kalil Printing, Upper Providence Township and Upper Providence Township Zoning Hearing Board, respectfully request this Honorable Court to deny the instant appeal with prejudice.

2. Respondents Kalil And Hess Are Entitled To Absolute Judicial Immunity.

Respondents Kalil and Hess, who at all relevant times were acting in a quasi-judicial capacity, are entitled to absolute judicial immunity, the immunity afforded individuals performing judicial functions. The fact that they are not judges does not alter this result.

It is the nature of the function performed -- adjudication -- rather than the identity of the actor who performed it, that determines whether absolute immunity attaches to an act. "In order

for quasi-judicial officials to be granted absolute judicial immunity, their acts must reflect the essence of judicial decision-making and involve discretion of a judicial nature." McMillan vs. Svetanoff, 793 F.2d 149, 151 (7th Cir. 1986), cert. denied, 479 U.S. 985, 107 Supreme Ct. 574, 93 L.Ed.2d 577 (1988). (Citations omitted).

The complaints in this action establish that this requirement has been satisfied. The Zoning Hearing Board hearings were adversarial proceedings at which petitioners and other participants presented evidence in testimony. All parties wanted respondents Kalil and Hess to listen to the evidence, review it and render a legal decision on the issues before it. Petitioners sought to have the members of the Board exercise their discretionary authority.

On these facts, "[t]here can be little doubt that the role of the [Zoning Hearing Board members] within this framework is functionally comparable to that of a judge." Butz vs. Economou, 438 U.S. 478, 480, 98 Supreme Ct. 2894, 2914, 57 L.Ed.2d 895 (1978). Petitioners wanted the Board members to engage in acts usually performed by a judge and dealt with the Board members in their judicial capacity. Therefore, absolute judicial immunity applies to the acts of these Board members. Stump vs. Sparkman, 435 U.S. 349, 98 Supreme Ct. 1099, 55 L.Ed. 331 (1978).

Accordingly, respondents Kalil and Hess respectfully request this Honorable Court to deny the instant appeal with prejudice.

3. The Lower Courts Correctly Determined That Petitioners Failed To State A Claim For Injunctive Or Declaratory Relief.

Petitioners contend that the trial court erred in dismissing their purported claims for declaratory and injunctive relief, stated against inter alia the respondent township in the first action, which are based upon the alleged pre-emption of the RFI (radio frequency interference) issue by federal law. Their position has no merit whatever.

The trial court correctly based its dismissal of these claims upon the non-existence of any "live dispute" between the parties, since petitioners did not seek any ruling or claim any protected property interest in the determination of the Zoning Hearing Board.

Furthermore, a plaintiff seeking injunctive relief must demonstrate a "real immediate" threat of injury to

fulfill the case and controversy requirement of Article III of the Constitution. The injury may not be merely abstract, conjectural or hypothetical. Id. Moreover, "'[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief...if unaccompanied by any continuing, present adverse affects,'" Id., quoting O-Shea vs. Littleton, 414 U.S. 488, 94 Supreme Ct. 669, at 674, 38 L.Ed. 2d 674 (1974).

Equally to the point, petitioners cannot state claims for injunctive and declaratory relief because the RFI issue was never a basis for the decision of the Zoning Hearing Board. Even if plaintiffs had made an issue of the Zoning Hearing Board decision, therefore, their claims for declaratory and injunctive relief

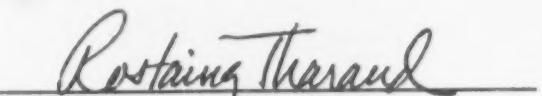
would still not address a case or controversy under Article III.

Accordingly, answering respondents respectfully request this Honorable Court to deny this appeal with prejudice.

CONCLUSION

For all the above reasons, answering respondents respectfully request this Honorable Supreme Court to deny the instant petition for certiorari.

Respectfully submitted,



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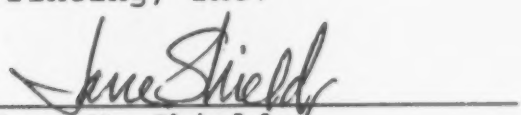

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